

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF THE APPLICATION
OF CHACO COMPRESSOR STATION
(HARVEST FOUR CORNERS) FOR AN AIR
QUALITY PERMIT, NO. P236R3 (TITLE V)

AQB 21-37

IN THE MATTER OF THE APPLICATION
OF CARRACAS CDP COMPRESSOR STATION
(HARVEST FOUR CORNERS) FOR AN AIR
QUALITY PERMIT, NO. P168R4 (TITLE V)

AQB 21-43

**WILDEARTH GUARDIANS' CLOSING ARGUMENT AND
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

CLOSING ARGUMENT

WildEarth Guardians, in accordance with the New Mexico Environment Department's Permit Procedures, 20.1.4.500 NMAC, submits its closing argument and proposed findings of fact and conclusions of law in the matters captioned above.

INTRODUCTION

Ambient air quality in northwest New Mexico is very nearly violating the federal air quality standard for ozone.¹ Indeed, air quality monitoring sites in San Juan and Rio Arriba Counties, the counties in which both facilities at issue in AQB 21-37 and AQB 21-43 are located, have recorded numerous exceedances of the ozone national ambient air quality standard in recent years.² This is significant because ozone pollution beyond this standard can seriously harm public health by decreasing lung function, causing respiratory inflammation, exacerbating

¹ Guardians Exhibit 4 at 4.

² See Guardians Exhibit 9.

asthma and allergies, and can even lead to hospitalizations and premature death.³ For this and other reasons, there is significant public interest in air quality permits that authorize oil and gas facility operations that emit air pollution and lead to more ozone formation. The September 2021 rulemaking hearing before the New Mexico Environmental Improvement Board, EIB No. 21-27, which proposed stricter ozone-related pollution regulations for the oil and gas industry, is a recent example of the seriousness of this issue and the public's interest and concern.

In light of this air quality problem in New Mexico, WildEarth Guardians ("Guardians") requested public hearings to ensure that the operating permits proposed for two oil and gas facilities, the Chaco Compressor Station and the Carracas CDP Compressor Station, operated by Harvest Four Corners LLC ("Harvest" or "Applicant") comply with the laws, rules, and standards of the New Mexico Air Quality Control Act ("AQCA") and the federal Clean Air Act ("federal act"). In written testimony and at a one-day public hearing that commenced on November 15, 2021, Guardians brought forward an affirmative case, explaining how the Department has not complied with the requirements for public participation procedures for the Chaco Compressor Station. Guardians also brought forward an affirmative case, explaining how, for both the Chaco and Carracas facilities, the conditions in the proposed permits for venting gas during startup, shutdown, maintenance, and malfunction ("SSM/M") events do not provide for compliance with the applicable legal requirements. Similarly, Guardians brought forward an affirmative case, explaining how the proposed permit for the Chaco facility does not include conditions that provide for compliance with the hourly emission limit for truck loading-condensate loadout, an applicable requirement. Finally, Guardians brought forward an affirmative case, explaining that, for both proposed permits, because the Department has not

³ U.S. EPA, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65303-11 (Oct. 26, 2015)

satisfied its legal obligations pursuant to New Mexico Executive Order 2005-056 issuance of both proposed permits would not be in accordance with the law. For these reasons, Guardians respectfully requests the Cabinet Secretary to direct the Department to address the deficiencies in both proposed permits or deny both permit applications.

I. Background and Procedural History

On December 10, 2019 and May 21, 2019, Harvest filed applications to renew its operating permits for the Carracas Central Delivery Point Compressor Station and the Chaco Compressor Station⁴ (the “Facilities”), respectively.⁵ Concerned about the emission of ozone precursors associated with the operation of these Facilities in a part of New Mexico that has demonstrated recent exceedances of the National Ambient Air Quality Standard (“NAAQS”) for ozone, Guardians reviewed the application proposals and submitted written public comments on March 19, 2021 and May 25, 2021, raising questions about the permit applications and requesting public hearings for both proposed permits.⁶ Guardians’ comments raised a number of questions and concerns with the permit applications, regarding legal notice, compliance with state and federal air regulations, among other issues. The Department did not substantively respond to either set of comments until November 1, 2021, when the Department filed its Statement of Intent to Present Technical Testimony.⁷

Based on Guardians’ request for a public hearing and its demonstration of significant public interest in the proposed permit, New Mexico Environment Department Cabinet Secretary, James Kenney (“Cabinet Secretary”) granted a public hearing for Harvest’s applications P239R3

⁴ Harvest had earlier, on October 2, 2019, filed an application (P236R2M2) to modify the Chaco facility, which the Department, on May 21, 2020, combined with Harvest’s application to renew the operating permit for the Chaco facility. *See* NMED Exh. 5 at 2-3.

⁵ NMED Exh. 5 at 2; NMED Exh. 6 at 2.

⁶ 21-37_AR607-608; 21-43_AR387-388.

⁷ AQB 21-37 and AQB 21-43 Hearing Transcript, (November 15, 2021) (“Hearing Transcript”) at 148:1-5; *see also* Guardians Amended Exhibit 1 at 6.

and P168RR4 in a Public Hearing Determination dated June 1, 2021.⁸ On June 24, 2021, the Cabinet Secretary subsequently ordered a public hearing be held in the matter AQB 21-37 and AQB 21-43 and appointed Gregory Chakalian to serve as Hearing Officer in this matter.⁹ Following a July 7, 2021 scheduling conference, the Hearing Officer consolidated the matters in AQB 21-37 and AQB 21-43 to be heard in a single public hearing.¹⁰

As part of a Motion in Limine filed on October 28, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering testimony or other evidence related to NAAQS for the Facilities.¹¹ On November 8, 2021, the Hearing Officer issued an order granting, in part, and denying, in part, the Applicant's Motion in Limine, ordering that based on the New Mexico Environmental Improvement Board's Final Order in EIB No. 20-21(A) and EIB No. 20-33(A),

“WildEarth Guardians’ testimony related to the discrete issue of whether the Chaco Compressor Station and the Carracas CDP Compressor Station cause or contribute to a violation of the ozone national ambient air quality standards or New Mexico ambient air quality standards, and whether the corresponding applications require a case-by-case analysis of a violation of the ozone standards is irrelevant in these matters under 20.1.4.400 NMAC.”¹²

As a result of the Hearing Officer's order, Guardians redacted its witness's written testimony, where it discussed this issue, and was precluded from presenting further testimony or evidence on this issue during the public hearing.

⁸ New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Jun. 1, 2021); *see also* 21-37_AR613-615.

⁹ Notice of Hearing and Appointment of Hearing Officer, AQB 21-37 (Jun. 24, 2021); Notice of Hearing and Appointment of Hearing Officer, AQB 21-43 (Jun. 24, 2021).

¹⁰ Scheduling Order, AQB 21-37 and 21-43 (Aug. 6, 2021).

¹¹ Motion in Limine, AQB 21-37 and 21-43 (Oct. 28, 2021).

¹² Order Granting in Part Motion in Limine, AQB 21-37 and 21-43 (Nov. 8, 2021). Guardians notes that the Hearing Officer did not grant the Applicant's Motion in Limine for the reasons stated in the Applicant's Motion but rather granted the motion, *sua sponte*, based on the EIB's Final Order in EIB No. 20-21(A) and EIB No. 20-33(A).

Along with the Applicant's Motion in Limine, on November 1, 2021 the parties also filed Statements of Intent to Present Technical Testimony in AQB 21-37 and AQB 21-43. As mentioned above, these filings were the first substantive response to Guardians public comments since it filed its first set of comments on March 19, 2021. The Applicant's and the Department's Statements of Intent to Present Technical Testimony helped resolve several concerns Guardians had raised in its earlier public comment letters, and Guardians, accordingly, focused its testimony during the public hearing on four remaining issues of concern with regard to Harvest's applications – the Department's legal notice for the Chaco facility, the proposed SSM/M emission limits for venting gas for both Facilities, the proposed condensate-loadout emission limits for the Chaco facility, and the Department's compliance with New Mexico Executive Order 2005-056.¹³

A one-day virtual hearing was held on November 15, 2021. This post-hearing submittal is timely filed in accordance with 20.1.4.500 NMAC and the Hearing Officer's oral order on November 15, 2021 setting the deadline for post-hearing filings for 30 days from the Notice of Transcript Filing. The Notice of Transcript Filing was filed on November 30, 2021.

II. Burden of Persuasion

For the purposes of the public hearing on the two Harvest permit matters before the Secretary, the New Mexico Administrative Code establishes a burden of persuasion for each of the parties in this case – the Applicant, the Department, and Guardians. 20.1.4.400A.(1) NMAC.

¹³ Guardians notes that the Final Order in EIB 20-21(A) and 20-33(A) did not address or resolve Guardians' concerns about ozone with regard to the Facility's proposed permit, and Guardians was precluded from presenting testimony and evidence on this issue of whether the proposed permit assure compliance with the ozone NAAQS due to the Hearing Officer's Order granting, in part, and denying, in part, the Applicant's Motion in Limine. To be clear, Guardians has not waived the issues related to the ozone NAAQS.

As the permit applicant, Harvest must prove that the proposed permit should be issued and not denied. *Id.* This burden does not shift. *Id.*

Separately, the Department “has the burden of proof for a challenged condition of a permit,” which the Department has proposed. *Id.* For purposes of Guardians’ argument that the SSM/M and truck loading-condensate loadout emission limits are inadequate, improper, and invalid, Guardians must present an affirmative case on the challenged condition. *Id.* The Hearing Officer must determine each matter in controversy by a preponderance of the evidence.

20.1.4.400A.(3) NMAC.

The Environment Department’s Permit Procedure regulations do not establish a burden of proof for issues that do not involve a specific permit condition. *See id.* at A(1).

III. Standard of Review

When taking administrative action, the Secretary and the Department must fundamentally ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; is supported by substantial evidence in the record; and is otherwise in accordance with law. NMSA 1978, § 74-2-9.C. “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm’n*, 133 N.M. 97, 104.

In addition to the Department’s standards for administrative actions, the Air Quality Control Act, NMSA 1978, § 74-2-7.C.(2), and the operating permit rules, 20.2.70 NMAC (“Part 70”), establish additional reasons why the Secretary and the Department may deny an application for an operating permit or must prohibit issuance of an operating permit. According to NMSA 1978, Section 74-2-7.C.(2), the Department may deny an application for an operating permit if the source will not meet the applicable standards, rules or requirements pursuant to the Air

Quality Control Act or the federal act. In addition to the Department's statutory authority to deny applications for operating permits, the Department has a regulatory obligation not to issue operating permits or permit renewals if any of five conditions listed in Part 70 are not satisfied, including:

- 1) The Department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 202.70.303 NMAC;
- 2) Except for administrative and minor permit modifications, the Department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;
- 3) Except for administrative amendments, the Department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;
- 4) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and
- 5) The Administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within that section.

20.2.70.400A. NMAC.

Condition four, above, requires that the conditions of the permit provide for compliance with all applicable requirements. The term "applicable requirement" is specifically defined in Part 70 according to a list of thirteen categories of standards and conditions, the most relevant of which to the Facilities include:

- 1) "Any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52;"
- 2) "Any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent;"

- 3) “Any national ambient air quality standard;” and
- 4) “Any regulation adopted by the board pursuant to the New Mexico Air Quality Control Act, Section 74-2-5(B) NMSA 1978.”

20.2.70.7E. NMAC.

When the Department finds that an emission source will not meet an applicable requirement, the Department may specify terms and conditions sufficient to ensure the operating permit complies with all the applicable requirements. NMSA 1978, § 74-2-7.D.(2). The U.S. Environmental Protection Agency maintains the same authority to ensure compliance with all applicable requirements.¹⁴

ARGUMENT

I. The Department failed to satisfy the legal notice requirements for the Chaco facility.

The Department violated its Public Notice and Participation regulations for Part 70 operating permits by failing to completely identify the comment procedures in its legal notice for the Chaco facility. The Department did not offer any testimony or evidence to address this issue Guardians raised. This permit application, therefore, must be denied.

The Public Notice and Participation regulations at 20.2.70.401 NMAC establish the Department’s procedural due process requirements for reviewing Part 70 operating permits. According to these regulations, the Department is legally obligated to publish a public notice of the permit application, including specific information identified in the operating permit regulations. *See* 20.2.70.401C.(3) NMAC. Among the information that must be included in the

¹⁴ *See, e.g., In the Matter of Public Service Company of New Mexico San Juan Generating Station*, Petition No. VI-2010-, Order Responding to Petitioners’ Request that the Administrator Object to Issuance of a State Operating Permit at 2; 4-5 (Feb. 15, 2012); *see also Sierra Club v. EPA*, 964 F.3d 882, fn 13 (citing Letter from John S. Seitz, Env’tl. Prot. Agency, to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO (May 20, 1999) (“[EPA] may object to or reopen a TV permit in response to a public petition showing that title I preconstruction permitting requirements have not been met.”)).

public notice, the Department shall identify “[a] brief description of the comment procedures required by the Department...” *Id.*

Instructions for how members of the public may submit comments or evidence to the Department are critical because public comments are a primary conduit for communicating public interest or concern about a proposed operating permit. Moreover, because the Department does not make copies of the draft permit and other supporting materials publicly available on the Department’s website, members of the public are required to request this information from the Department, if they are interested to review it. *See* 20.2.70.401C.(6) NMAC. In other words, critical due process rights and an opportunity for fair and safe public participation depend fundamentally on an understanding of how comments may be submitted to the Department and how permit-related information can be obtained. With regard to the permit application for the Chaco facility, the Department failed to provide the public information necessary to understand how it could safely submit comments on this application to the Department or request permit-related information from the Department.

The Department’s legal notice for the Chaco facility included the following description for how members of the public could submit comments to the Department:

“Interested persons may obtain the draft operating permit, submit written comments, or request a public hearing on Operating Permit Number P236-R3 by contacting Urshula Bajracharya at the New Mexico Environment Dept., Air Quality Bureau, Permit Section, 525 Camino de los Marquez Suite 1, Santa Fe, NM 87505-1816.”¹⁵

This language only indicates that members of the public may submit comments on the permit application to the Department’s physical address. The legal notice did not indicate that comments may be submitted electronically nor did the legal notice provide an email address, at which the

¹⁵ 21-37_AR600.

Department would accept comments or requests for information.¹⁶ The Department omitted this information despite the fact that the Department was accepting public comment submitted electronically,¹⁷ and despite the fact that the language in the federal act, with which the New Mexico Operating Permit regulations must comply, does not limit the Department to identifying only the physical address, where comments may be submitted on information obtained.¹⁸ The Department's omission of instructions for how to electronically submit public comment is also problematic because, as Guardians' witness, Jeremy Nichols, testified, the public's ability to safely submit comments to the Department's physical address has been severely limited by the COVID-19 virus.¹⁹

Submitting a comment to the Department's physical address, as the legal notice for the Chaco facility instructed, could require a person to take actions that risk exposure to the COVID-19 virus, including purchasing paper, writing instruments, envelopes, and postage and depositing the comment letter at a post office. These actions pose even greater risks to individuals who are elderly, immune-compromised, have co-morbidities, and for those who may be caring for family members and friends with these risk factors. The Department acknowledged the public health risks of people gathering indoors in the midst of the COVID-19 pandemic by closing some of its offices,²⁰ as well as by providing an email address and instructions for how the public could submit comments and evidence to the Department electronically regarding the Carracas facility.²¹ It would have been reasonable and consistent for the Department to extend these public

¹⁶ *See id.*

¹⁷ NMED Exh. 5 at 3; NMED Exh. 6 at 3.

¹⁸ *See* 40 C.F.R. § 70.7(h)(2) (stating, adequate procedures for public notice shall include "the name, address, and telephone number of a person (*or an email or website address*) from whom interested persons may obtain additional information, including copies of the permit draft..." (emphasis added)).

¹⁹ Guardians Amended Exh. 1 at 8.

²⁰ 21-37_AR601; 21-43_AR367.

²¹ 21-43_AR366.

health precautions to members of the public who may have been interested to comment on or request information about the Chaco facility, but as discussed above, the Department chose not to revise and republish the legal notice for this facility. As a result, some members of the public who could have otherwise submitted comments or requested copies of the draft permit and other permit-related information electronically may have decided not to do so because the only method of comment submission and method for obtaining copies of the draft permit and other information identified in the Department's legal notice may have entailed exposure to the COVID-19 virus.

The Department is obligated to publish a legal notice for every operating permit application that informs members of the public how comments and evidence may be submitted to the Department. At a time when submitting comments through the post could have resulted in serious public health impacts and at a time when the Department was, in fact, accepting comment electronically, the Department was required to include instructions in the legal notice for the Chaco facility for how to submit comments and evidence electronically. The Department's legal notice for this permit application did not include this information, which violated 20.2.70.401A.(7) NMAC. Moreover, the Department did not provide any testimony or evidence explaining how its legal notice satisfied the Department's regulatory burden. Accordingly, the Department must revise and republish this legal notice, offering the public a new 30-day comment period, or the Department must deny this permit application.

II. The conditions related to emission limits for SSM/M do not provide for compliance with the applicable requirements or the requirements of Part 70.

Permit limitations established in a permit issued pursuant to an EPA-approved State Implementation Plan ("SIP") must be practically enforceable. The New Mexico Operating

Permit regulations also include several provisions requiring operating permits to include monitoring conditions that are sufficient to yield reliable data from which compliance with the associated emission limits can be assured. Here, the proposed startup, shutdown, and maintenance (“SSM”) and malfunction (“SSM/M”) emission limits for both Facilities are not practically enforceable and fail to include monitoring conditions sufficient to assure compliance with the associated emission limits. The proposed permits must, therefore, be revised or denied.

Practical enforceability is a fundamental element of permit limitations in permits issued pursuant to an EPA-approved SIP.²² Without practically enforceable permit limitations, air pollution control agencies would be unable to ensure facilities comply with applicable air pollution laws and regulations established to ensure air quality standards are met and air pollution is prevented or abated – two duties set out in the AQCA. *See* NMSA 1978, § 74-2-5.A. and B.(1). Further, practically enforceable permit limitations are also used to prevent an emission source from qualifying as a major source by restricting the source’s potential to emit below the major source threshold. However, to appropriately limit a source’s potential to emit, only permit limitations that are both practically enforceable (i.e. enforceable as a practical matter) and federally enforceable may be considered.²³

A permit limitation is federally enforceable if it is contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved by EPA as such.²⁴ To be practically enforceable, a permit limitation must be consistent with at least three criteria set out by the EPA. A source-specific permit term must specify:

- 1) a technically accurate limitation and the portions of the source subject to the limitation;

²² Guardians Exh. 6 at 1-2.

²³ *Id.*

²⁴ *Id.*

- 2) the time period for the limitation (hourly, daily, monthly, annually); and
- 3) the method to determine compliance including appropriate monitoring, record keeping and reporting.²⁵

The third criterion is essential to practical enforceability because without a specific method to determine compliance, there is no assurance that the data necessary for compliance determinations will be accurately and properly collected.²⁶ The proposed permit limits for SSM/M emissions from both Facilities are not practically enforceable because they do not specify a method for quantifying the total volume of gas emitted during SSM/M events to determine compliance.

In addition to the requirements for practical enforceability under the federal Clean Air Act, the New Mexico Operating Permit regulations regarding monitoring also require operating permits to specify the methods that operators will use to assure compliance with permit terms.

According to Part 70, Section 302, operating permits:

“shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.”

20.2.70.302.C.(1). NMAC. This section in the operating regulations further requires that:

“[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit, as reported pursuant to Subsection E of 20.2.70.302 NMAC...such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.”

Id. at (2). Finally, the monitoring requirements in an operating permit “shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring

²⁵ Guardians Exh. 7 at 6.

²⁶ *See* Guardians Exh. 8 at 10.

equipment or methods.” *Id.* at (3). These regulations clearly require operating permits include specific methods and measures sufficient to verify compliance with permit terms and conditions. The proposed operating permits for the Chaco and Carracas facilities fail to assure that a specific method will be used consistently to verify compliance with the SSM/M emission limits.

Section A107 in each proposed permit establishes emission limits for startup, shutdown, and maintenance events and malfunction events.²⁷ In particular, section A107 for the Chaco facility proposes that annual emissions of VOCs from venting gas due to SSM events total no more than 24.5 tons per year (“tpy”) and no more than 10 tpy of VOCs from venting gas due to malfunction events.²⁸ Section A107 for the Carracas facility proposes that annual emissions of VOCs from venting gas due to SSM events total no more than 5 tpy and no more than 5 tpy of VOCs from venting gas due to malfunction events.²⁹ Subsections of A107 in each proposed permit proceed to establish additional monitoring, recordkeeping, and reporting requirements necessary to determine whether the Applicant is in compliance with the emission limits.³⁰ However, the requirements for monitoring and recording the quantity of VOCs emitted during SSM/M events fail to establish a specific methodology the Applicant must use.

In both proposed permits, the monitoring requirements for emissions during SSM events only vaguely require the Applicant to “monitor the permitted routine and predictable startups and shutdowns and scheduled maintenance events.”³¹ Similarly, during malfunctions, both proposed permits only require the Applicant to “monitor all malfunction events that result in VOC emissions including identification of the equipment or activity that is the source of emissions.”³²

²⁷ NMED Exh. 16 at A8-A9; 21-43_AR330-332.

²⁸ NMED Exh. 16 at A8.

²⁹ 21-43_AR330-331.

³⁰ NMED Exh. 16 at A8-A9; 21-43_AR330-332.

³¹ NMED Exh. 16 at A9; 21-43_AR331.

³² NMED Exh. 16 at A9; 21-43_AR331.

These monitoring sections for both types of emission events do not provide further detail for how the Applicant should monitor VOC emissions.³³ The subsequent recordkeeping sections for SSM and malfunction events provide slightly more detail about the types of information that must be recorded but, again, both proposed permits fail to specify a methodology for measuring the quantity of gas emitted during SSM/M events. The recordkeeping sections for SSM emissions in both proposed permits only state, in relevant part:

“To demonstrate compliance, each month records shall be kept of the cumulative total of VOC emissions during the first 12 months due to SSM events and, thereafter of the monthly rolling 12-month total VOC emissions. (2) Records shall also be kept of the inlet gas analysis, the percent VOC of the gas based on the most recent gas analysis, and of the volume of total gas vented in MMscf used to calculate the VOC emissions...”³⁴

The malfunction recordkeeping requirements in both permits are virtually identical to the SSM recordkeeping requirements, stating in relevant part:

“To demonstrate compliance, each month records shall be kept of the cumulative total of all VOC emissions due to malfunction events during the first 12 months and, thereafter of the monthly rolling 12-month total VOC emissions due to malfunction events. (2) Records shall also be kept of the inlet gas analysis, the percent VOC of the gas based on the most recent gas analysis, of the volume of gas vented in MMscf used to calculate the VOC emissions...”³⁵

Nothing in these recordkeeping sections establishes a specific methodology for quantifying the amount of VOCs released during SSM or malfunction events. The Applicant’s witness, James Newby, confirmed that the proposed permits do not include a methodology for quantifying SSM/M emissions.³⁶

³³ *See id.*

³⁴ NMED Exh. 16 at A9; 21-43_AR331.

³⁵ NMED Exh. 16 at A9; 21-43_AR331-332.

³⁶ Hearing Transcript at 56:25 – 57:1-10.

Absent a methodology for measuring the quantity of VOC emissions during SSM and malfunction events, stated as a written requirement within both operating permits, the Applicant has no obligation to monitor and record these emissions according to an understood method that ensures the emissions are accurately quantified. In other words, nothing in the proposed permits prevents the Applicant from quantifying the total emissions during SSM/M events based on more than a guesstimate. As such, the Department (and, in effect, the public) cannot be assured that the monitoring data it receives was discerned using an appropriate methodology that accurately quantifies the total vented emissions.

The Department provided testimony from its staff that there is, in fact, a particular methodology for quantifying emissions released during SSM/M events, even though this methodology is not stated in or required by the proposed permits. In written testimony, the Department's witness, James Nellessen, explained that the methods for tracking the quantity of emissions released during SSM and malfunction events are provided – not in the proposed permits – but in the “application (Section 6) with the demonstrating calculations [AR No. 1 of AQB 21-37, Bates 001-527; and AR No. 1 of AQB 21-43, Bates 001-298].”³⁷ Mr. Nellessen further testified that the permit applications include “specifics of the methodology” for quantifying emissions during SSM and malfunction events, and that the general conditions in Part B of the proposed permits require Harvest to monitor SSM/M emissions according to the “specifics” described in its permit applications.³⁸ Mr. Nellessen's testimony described above does not accurately reflect the language in the proposed operating permits, nor does Mr.

³⁷ NMED Exh. 4 at 4. Instead of pointing the Hearing Officer to specific pages within the Chaco and Carracas permit applications that, according to Mr. Nellessen, set out the specific methodology for quantifying VOC emissions during SSM and malfunction events, Mr. Nellessen cited to over 500 pages in the administrative record for the Chaco facility and nearly 300 pages in the administrative record for the Carracas facility. It is unclear from Mr. Nellessen's written testimony where exactly in the Chaco and Carracas permit applications a specific methodology for measuring these VOC emissions is presented.

³⁸ Hearing Transcript at 114:3-25 – 115:1-13.

Nellessen's testimony accurately interpret the Applicant's monitoring obligations according to the plain language in the proposed permits.

First, the general conditions Mr. Nellessen described are not included in the proposed operating permits, nor in any of the documents submitted by the Department, the Applicant, or provided in the administrative record for these cases. The current NSR permit for the Chaco facility includes a general condition similar to the one described by Mr. Nellessen that states:

“The contents of a permit application specifically identified by the Department shall become the terms and conditions of the permit or permit revision. Unless modified by conditions of this permit, the permittee shall construct or modify and operate the Facility in accordance with all representations of the application and supplemental submittals that the Department relied upon to determine compliance with applicable regulations and ambient air quality standards.”³⁹

However, this condition makes clear that the only contents of a permit application that become terms or conditions of a permit or permit revision are those contents that are specifically identified by the Department. Nowhere in the draft operating permits or in the associated Statements of Basis for these permits does the Department specifically identify language in the permit applications regarding the methodology for quantifying VOC emissions during SSM and malfunction events that constitute enforceable terms and conditions of the proposed operating permits.

Second, the portion of the permit application for the Chaco facility that Mr. Nellessen referenced during the public hearing does not require a specific methodology for measuring the quantity of VOCs emitted during SSM and malfunction events. During the public hearing, Mr. Nellessen testified that at Bates page 54 in the administrative record for the Chaco facility, Harvest's permit application for the Chaco facility required a specific methodology for

³⁹ New Mexico Environment Department, NSR Permit No. 0759-M6, Chaco Compressor Station, (Oct. 12, 2018) at A7.

measuring the quantity of gas emitted during SSM and malfunction events.⁴⁰ Setting aside the fact that Bates page 54 does not reference Harvest's current permit application under consideration in this hearing, that page of Harvest's old permit application merely provides the calculations Harvest used to determine the controlled and uncontrolled emission rates. This section of Harvest's old application does not require, as a practically enforceable permit condition, Harvest to use a specific methodology for measuring the quantity of emissions during individual SSM events. Moreover, the corresponding portion of Section 6 of the permit application for emissions during malfunction events also provides no methodology or requirement to use a specific methodology for quantifying VOCs emissions during these events.⁴¹ The same is true in Harvest's application for the Carracas facility – the application does not require a specific methodology for quantifying VOC emissions from individual SSM and malfunction events.⁴² Despite the Department's testimony and evidence, the fact remains that the proposed permits for both Facilities fail to specify a methodology for quantifying emissions during SSM and malfunction events.

Neither of the proposed operating permits require a specific method for quantifying VOC emissions during SSM and malfunction events the ensures each facility complies with the associated SSM and malfunction emission limits. Accordingly, the proposed permits are not practically enforceable, as required by the federal act, and do not satisfy the regulatory requirements for monitoring set forth in Part 70, Section 302C NMAC. As such, the Department may not issue these permits because the conditions therein do not provide for compliance with

⁴⁰ Hearing Transcript at 110:5-16.

⁴¹ See 21-37_AR60.

⁴² See 21-43_AR100, 103.

all applicable requirements and the requirements of Part 70. 20.2.70.400A(4) NMAC. The Department should either revise or deny both proposed permits.

III. The conditions related to emission limits for truck loading-condensate loadout for the Chaco facility do not provide for compliance with the applicable requirements.

The conditions of the proposed operating permit for the Chaco facility must provide for compliance with all applicable requirements, which include any term or condition of a preconstruction permit. *See* 20.2.70.7E.(2) NMAC. The Chaco facility's preconstruction permit (also referred to as "New Source Review (NSR) permit") sets an hourly emission limit on truck loading-condensate loadout. However, the proposed operating permit for the Chaco facility does not include this hourly emission limit or provide for compliance with this applicable requirement. Therefore, the Department must revise or deny this permit application.

As discussed above, an operating permit may only be issued if, among other things, the conditions of the permit provide for compliance with all applicable requirements and the requirements of Part 70. 20.2.70.400A.(4) NMAC. The Part 70 definition of applicable requirement includes "[a]ny term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent." 20.2.70.7E.(2) NMAC. The NSR permit for the Chaco facility restricts VOC emissions from truck loading-condensate loadout to 37.1 pounds per hour (pph).⁴³ Moreover, in its operating permit application, Harvest specifically requested that allowable VOC emissions during truck loading-condensate loadout from the Chaco facility be restricted to 37.12 pph.⁴⁴

⁴³ New Mexico Environment Department, NSR Permit No. 0759-M6, Chaco Compressor Station, (Oct. 12, 2018) at A7; *see also* Hearing Transcript at 58:22-25 – 59:1-4.

⁴⁴ 21-37_AR292; *see also* Hearing Transcript at 57:17-20.

However, the proposed operating permit does not include this emission limit, instead indicating that an hourly emission limit is not appropriate for truck loading-condensate loadout.⁴⁵

The Chaco facility's 37.1 pph VOC emission limit in its 2018 NSR permit is an applicable requirement for purposes of Part 70, and as such, the Chaco facility's operating permit must include conditions that provide for compliance with this emission limit. The proposed operating permit for the Chaco facility, as currently drafted, does not. On November 15, 2021, the morning of the public hearing on the Chaco facility, the Department filed NMED Exhibit 16, which was a copy of the latest version of the draft operating permit for the Chaco facility, including at least one significant change to the proposed permit. In this version of the Chaco permit, the Department deleted the 37.1 pph VOC emission limit for truck loading-condensate loadout. The Department's witness, Urshula Bajracharya, submitted written testimony, stating that a numeric VOC emission limit for truck loading-condensate loadout was an error in the draft operating permit and was inconsistent with other new source review and operating permits issued by AQB, as well as the AQB Monitoring Protocol for Tanks and Loading.⁴⁶ However, by deleting the hourly emission limit for truck loading-condensate loadout, the draft operating permit for the Chaco facility is now inconsistent with its own NSR permit, which includes this emission limit. According to the draft operating permit for the Chaco facility, the NSR Permit No. 0759M6 permit for the Chaco facility, in its entirety, is a federally enforceable, applicable requirement, including the hourly emission limit for truck loading-condensate loadout.⁴⁷ Without this emission limit and associated monitoring, recordkeeping, and reporting requirements, the

⁴⁵ NMED Exh. 16 at A7.

⁴⁶ NMED Exh. 5 at 7.

⁴⁷ NMED Exh. 16 at A4.

draft operating permit lacks conditions that provide for compliance with all applicable requirements. Therefore, the Department must revise or deny the draft operating permit.

IV. The Department's issuance of the proposed permit would not be in accordance with Executive Order 2005-056.

In reviewing the applications for both Facilities and the associated proposed permits, the Department did not satisfy its legal obligations according to Executive Order 2005-056 ("EO 2005-056"). As a result, the Department must properly address its obligations pursuant to EO 2005-056 or deny the proposed permits.

Administrative agencies have an implied duty to ensure its actions meet the legal standards of the New Mexico Administrative Procedures Act. *See* NMSA 1978, §§ 12-8-1 – 12-8-25. The Air Quality Control Act specifically refers to these legal standards in establishing the grounds on which a Department decision may be set aside by an appellate court. NMSA 1978, § 74-2-9.C. Pursuant to this legal standard, the Department must ensure its actions are not arbitrary, capricious, or an abuse of discretion; are supported by substantial evidence in the record; and are otherwise in accordance with law. Executive Orders have the force of law and are among the laws with which the Department's actions must comply.⁴⁸

EO 2005-056 directs the Department to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.⁴⁹ To address this legal obligation, the Department testified that it applied NMED Policy 07-13.⁵⁰ However, that policy establishes the Department's

⁴⁸ 81A C.J.S. States § 257; *see also* 81A C.J.S. States § 130b.

⁴⁹ Guardians Rebuttal Exh. 13 at 2.

⁵⁰ NMED Exh. 1 at 5.

public participation policy, not an environmental justice policy that meets the obligations set forth in EO 2005-056. In fact, EO 2005-056 is never mentioned in NMED Policy 07-13, and the term “environmental justice” does not appear in the “Subject,” “Purpose,” “Policy,” or “Reference” headings of this policy document.⁵¹ The Department also testified that it analyzed demographic information of residents living within a 4-mile circle around the Facility using EPA’s EJSCREEN tool, but the plain language of EO 2005-056 requires more than a demographic analysis – the order directs the Department to “utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.”⁵²

The Department’s application of NMED Policy 07-13 is insufficient to satisfy the Department’s obligations according to EO 2005-056. The Department did not present testimony or evidence demonstrating it addressed its environmental justice obligations by other means. As a result, the Department’s issuance of the proposed permits would not be in accordance with the law. The Department must, therefore, address its obligations pursuant to EO 2005-056 or deny the applications.

V. Conclusion

Operating permits authorizing oil and gas facilities to emit air contaminants must always be developed and issued in accordance with the applicable air pollution laws and rules, but compliance with these legal requirements is even more important based on the fact that ozone levels in northwest New Mexico have and continue to reach levels that can seriously harm public health. In testimony and during the public hearing, Guardians presented an affirmative case in

⁵¹ See Guardians Rebuttal Exh. 13; *see also* Hearing Transcript at 116:15-25 – 117:1-13.

⁵² Guardians Rebuttal Exh. 13 at 2.

AQB 21-37 that the Department's legal notices violated 20.2.70.401C.(7) NMAC. In testimony and during the public hearing, Guardians also presented an affirmative case in both Harvest matters, AQB 21-37 and AQB 21-43, that the Facilities' proposed SSM/M emission limits for venting gas are neither practically enforceable nor in compliance with the monitoring requirements for operating permits set forth in Part 70, Section 302C and, therefore, do not provide for compliance with all applicable requirements. Similarly, Guardians presented an affirmative case that the proposed operating for the Chaco facility fails to provide for compliance with the applicable emission limit for truck loading-condensate loadout. Finally, Guardians presented an affirmative case both Harvest matters for why issuance of the proposed permits by the Department would not be in accordance with the law because the Department failed to properly address its legal obligations pursuant to EO 2005-0056. Neither the Department nor the Applicant provided sufficient evidence to dispel the legal violations brought forth by Guardians and prove that the proposed permits can be legally issued. For these reasons, Guardians respectfully requests the Cabinet Secretary direct the Department to revise the proposed permits to remedy the deficiencies discussed above or deny the permit applications.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-37

Findings of Fact

Procedural Facts

1. The Applicant, Harvest Four Corners LLC filed Application P236R2M2 (modification) and P236R3 (renewal) with the Department on October 2, 2019 and May 21, 2020, respectively. NMED Exh. 5 at 2.
2. The Department published the Department's legal notice for the proposed permit in the Farmington Daily Times on February 19, 2021, initiating a 30-day comment period.
3. Guardians submitted a timely public comment letter on March 19, 2021, raising issues of concern and requesting a public hearing. *Id.* at 3.
4. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1, 2021 Cabinet Secretary James Kenney granted a public hearing for Harvest's Application P236R3. New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Jun. 1, 2021); *see also* 21-37_AR613-615.
5. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-37. Notice of Hearing and Appointment of Hearing Officer, AQB 21-37 (Jun. 24, 2021).
6. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-37 with another public hearing authorized by the Cabinet Secretary to address issues related to a separate facility and an application to renew its operating permit. Scheduling Order, AQB 21-37 and AQB 21-43 (Jul. 20, 2021).

7. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.206C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing. Order Amending Scheduling Order, AQB 21-37 and AQB 21-43 (Aug. 6, 2021).
8. On November 1, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
9. In a Motion in Limine filed on October 28, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering testimony or other evidence related to the NAAQS in AQB 21-37 and AQB 21-43. Motion in Limine, AQB 21-37 and AQB 21-43 (Oct. 28, 2021).
10. On November 8, 2021, the Hearing Officer issued an order granting, in part, and denying, in part, the Applicant's Motion in Limine. Based on the New Mexico Environmental Improvement Board's Final Order in EIB No. 20-21(A) and EIB No. 20-33(A), the Hearing Officer held that:

“WildEarth Guardians' testimony related to the discrete issue of whether the Chaco Compressor Station and the Carracas CDP Compressor Station cause or contribute to a violation of the ozone national ambient air quality standards or New Mexico ambient air quality standards, and whether the corresponding applications require a case-by-case analysis of a violation of the ozone standards is irrelevant in these matters under 20.1.4.400 NMAC.”

Order Granting in Part Motion in Limine, AQB 21-37 and 21-43 (Nov. 8, 2021).
11. By the terms of the Hearing Officer's Order on Applicant's Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to whether

the proposed permitting actions would cause or contribute to ozone NAAQS violations and whether a proposed permitting action requires a case-by-case analysis of a violation of the ozone standard.

12. On November 15, 2021, the Hearing Officer held a one-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

13. The Department's legal notice for Application P236R3 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-37_AR600-601.

14. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. *Id.*

15. The Department did accept electronically-submitted public comments related to Application P236R3. 21-37_AR607-608

16. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020. N.M. Exec. Order No. 2021-044 (Jul. 23, 2021).

17. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and depositing letters at a post office, present public health risks due to COVID-19, especially to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.

18. The Department included instructions in its legal notice for the Carracas facility, instructing the public that public comment could be submitted to the Department electronically. Hearing Transcript at 99:25 – 100:1-5.

19. The Department provided no testimony or evidence as to the adequacy of its legal notice of the permit application for the Chaco facility.

Facts Regarding Proposed SSM/M Emission Limits

20. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 24.5 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. NMED Exh. 16 at A8.
21. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id.* at A8-A9.
22. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id.*

Facts Regarding Proposed Truck Loading-Condensate Loadout Emission Limits

23. The Chaco facility's NSR permit includes a limit, restricting emissions from truck loading-condensate loadout to 37.1 pph of VOCs. New Mexico Environment Department, NSR Permit No. 0759-M6, Chaco Compressor Station, (Oct. 12, 2018) at A7.
24. In Harvest's operating permit application for the Chaco facility, it requested an emission limit for truck loading-condensate loadout of 37.12 pph VOCs. 21-37_AR293.
25. There is no hourly emission limit in the proposed operating permit for the Chaco facility. NMED Exh. 16 at A7.

Facts Regarding the Executive Order 2005-056

26. The Department testified that when it evaluated the proposed permit for the Chaco facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Exh. 1 at 5.

27. NMED Policy 07-13 is the Department's policy regarding public participation. *See* Guardians Rebuttal Exh. 13.
28. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056. *See id.*
29. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

30. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
31. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
32. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
33. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.
34. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id.*

35. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id.*
36. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978, § 74-2-9.C.
37. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 104.
38. Pursuant to NMSA 1978, Section 74-2-7.C.(2), the Department may deny an application for an operating permit if the source will not meet the applicable standards, rule or requirements pursuant to the Air Quality Control Act or the federal act.
39. Pursuant to the New Mexico operating permit regulations the Department also may not issue an operating permit or permit renewal based on five conditions that must be independently satisfied, including:
- a) The Department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 202.70.303 NMAC;
 - b) Except for administrative and minor permit modifications, the Department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;
 - c) Except for administrative amendments, the Department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;
 - d) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and
 - e) The Administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within that section. 20.2.70.400A. NMAC.

40. The term “applicable requirement” is defined at 20.2.70.7E NMAC and includes:

- a) any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52;
- b) any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent;
- c) any national ambient air quality standard; and
- d) any regulation adopted by the board pursuant to the New Mexico Air Quality Control Act, Section 74-2-5(B) NMSA 1978. 20.2.70.7E. NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

41. Section 20.2.70.401C.(7) NMAC requires the Department to publish a public notice in the newspaper regarding pending operating permit applications, including a brief description of the comment procedures required by the Department.

42. Because the Department’s legal notice of the permit application regarding the Chaco facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the operating permit regulations at 20.2.70.401C.(7) NMAC.

43. Because the proposed permit renewal for the Chaco facility violated 20.2.70.401C.(7) NMAC, the Department may not issue the proposed operating permit for the Chaco facility. 20.2.70.400A.(2). NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

44. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable. *See* Guardians Exh. 7 at 5.

45. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including:

- a) a technically accurate limitation and the portions of the source subject to the limitation;
- b) the time period for the limitation; and
- c) the method to determine compliance including appropriate monitoring, record keeping and reporting.

Id. at 6.

46. The SSM and malfunction emission limits for the Chaco facility are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events. *Id.*

47. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application. 20.2.70.400A.(4) NMAC; *see also* NMSA 1978, § 74-2-7.C.(2).

48. Operating permits must also comply with the following regulatory requirements:

- a) “Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.” 20.2.70.302.C.(1). NMAC;
- b) “Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit, as reported pursuant to Subsection E of

20.2.70.302 NMAC...such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.” *Id.* at (2); and

c) “The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.” *Id.* at (3).

49. The proposed operating permit for the Chaco facility does not include a methodology sufficient to assure and verify compliance with the emission limit for SSM and malfunction events in accordance with the monitoring requirements in Part 70, Section 302C.

50. Because the operating permit for the Chaco facility, as drafted, does not comply with the applicable requirements of Part 70, the Department may not issue this permit.

20.2.70.400A.(4) NMAC; *see also* NMSA 1978, § 74-2-7.C.(2).

Conclusions of Law Regarding Truck Loading-Condensate Loadout Emission Limits

51. The hourly emission limit for truck loading-condensate loadout in the NSR Permit No. 0759M6 for the Chaco facility is an applicable requirement. 20.2.70.7E.(2) NMAC.

52. Because the proposed operating permit does not include an emission limit and other conditions that provide for compliance with the hourly emission limit for truck loading-condensate loadout in the NSR permit for the Chaco facility, the proposed operating permit may not be issued. 20.2.70.400A.(4) NMAC.

Conclusions of Law regarding Executive Order 2005-056

53. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as

well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.

54. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Chaco facility.

55. The Department's issuance of the proposed permit for the Chaco facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, be denied.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-43

Findings of Fact

Procedural Facts

1. The Applicant, Harvest Four Corners LLC filed Application P168R4 with the Department on December 10, 2019. NMED Exh. 6 at 2.
2. The Department published the Department's legal notice for the proposed permit in the Farmington Daily Times on April 25, 2021, initiating a 30-day comment period.
3. Guardians submitted a timely public comment letter on May 25, 2021, raising issues of concern and requesting a public hearing. *Id.* at 3.
4. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1, 2021 Cabinet Secretary James Kenney granted a public hearing for Harvest's Application P168R4. New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Jun. 1, 2021); *see also* 21-43_AR394-396.
5. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-43. Notice of Hearing and Appointment of Hearing Officer, AQB 21-43 (Jun. 24, 2021).
6. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-43 with another public hearing authorized by the Cabinet Secretary to address issues related to a separate facility and an application to renew its operating permit. Scheduling Order, AQB 21-37 and AQB 21-43 (Jul. 20, 2021).

7. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.206C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing. Order Amending Scheduling Order, AQB 21-37 and AQB 21-43, (Aug. 6, 2021).
8. On November 1, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
9. On November 15, 2021, the Hearing Officer held a one-day virtual hearing in this matter.

Facts Regarding Proposed SSM/M Emission Limits

10. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 5 tpy of VOCs and, for malfunction events, restricting emissions to 5 tons per year of VOCs. 21-43_AR330-331.
11. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id.* at 331-332.
12. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id.*

Facts Regarding the Executive Order 2005-056

13. The Department testified that when it evaluated the proposed permit for the Chaco facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Exh. 1 at 5.
14. NMED Policy 07-13 is the Department's policy regarding public participation. *See* Guardians Rebuttal Exh. 13.
15. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056. *See id.*
16. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

17. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
18. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
19. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
20. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.

21. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id.*
22. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id.*
23. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978, § 74-2-9.C.
24. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 104.
25. Pursuant to NMSA 1978, Section 74-2-7.C.(2), the Department may deny an application for an operating permit if the source will not meet the applicable standards, rule or requirements pursuant to the Air Quality Control Act or the federal act.
26. Pursuant to the New Mexico operating permit regulations the Department also may not issue an operating permit or permit renewal based on five conditions that must be independently satisfied, including:
- a) The Department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under 202.70.303 NMAC;
 - b) Except for administrative and minor permit modifications, the Department has complied with the requirements for public participation procedures under 20.2.70.401 NMAC;
 - c) Except for administrative amendments, the Department has complied with the requirements for notifying and responding to affected programs under 20.2.70.402 NMAC;
 - d) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this Part; and

e) The Administrator has received a copy of the proposed permit and any notices required under 20.2.70.402 NMAC, and has not objected to issuance of the permit within the time period specified within that section. 20.2.70.400A. NMAC.

27. The term “applicable requirement” is defined at 20.2.70.7E NMAC and includes:

a) any standard or other requirement provided for in the New Mexico state implementation plan approved by US EPA, or promulgated by US EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52;

b) any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent;

c) any national ambient air quality standard; and

d) any regulation adopted by the board pursuant to the New Mexico Air Quality Control Act, Section 74-2-5(B) NMSA 1978. 20.2.70.7E. NMAC

Conclusions of Law Regarding Proposed SSM/M Emission Limits

28. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable. *See* Guardians Exh. 7 at 5.

29. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including:

a) a technically accurate limitation and the portions of the source subject to the limitation;

b) the time period for the limitation; and

c) the method to determine compliance including appropriate monitoring, record keeping and reporting.

Id. at 6.

30. The SSM and malfunction emission limits for the Carracas facility are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events. *Id.*
31. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application. 20.2.70.400A.(4) NMAC; *see also* NMSA 1978, § 74-2-7.C.(2).
32. Operating permits must also comply with the following regulatory requirements:
- a) “Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.” 20.2.70.302.C.(1). NMAC;
 - b) “Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit, as reported pursuant to Subsection E of 20.2.70.302 NMAC...such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.” *Id.* at (2); and
 - c) “The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.” *Id.* at (3).
33. The proposed operating permit for the Carracas facility does not include a methodology sufficient to assure and verify compliance with the emission limit for SSM and malfunction events in accordance with the monitoring requirements in Part 70, Section 302C.
34. Because the operating permit for the Carracas facility, as drafted, does not comply with the applicable requirements of Part 70, the Department may not issue this permit. 20.2.70.400A.(4) NMAC; *see also* NMSA 1978, § 74-2-7.C.(2).

Conclusions of Law regarding Executive Order 2005-056

35. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
36. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Carracas facility.
37. The Department's issuance of the proposed permit for the Carracas facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, be denied.

Respectfully submitted this 29th day of December, 2021,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of **WILDEARTH GUARDIANS' CLOSING ARGUMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served on December 29, 2021 via email to the persons listed below:

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